Office-Supreme Court, U.S.
FILED
MAY 24 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1225

In the Supreme Court of the United States

OCTOBER TERM, 1984

ANTHONY J. COSTANZO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

SAMUEL ROSENTHAL
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the actions of a government informant violated petitioner's Sixth Amendment rights.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) in these proceedings under 28 U.S.C. 2255 is reported at 740 F.2d 251, and the prior opinion of the court of appeals in these proceedings is reported at 625 F.2d 465. The opinions of the district court dated November 18, 1982 (Pet. App. A18-A33) and January 25, 1983 (Pet. App. A37-A43) are unreported. The court of appeals' affirmance of petitioner's conviction on direct appeal is reported at 591 F.2d 1337 (Table), cert. denied, 441 U.S. 961.

JURISDICTION

The judgment of the court of appeals (Pet. App. A46-A48) was entered on July 26, 1984, and the petition for rehearing was denied on August 27, 1984 (Pet. App. A49-A50). The petition for a writ of certiorari was filed on January 24, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted in 1978 of conspiracy to possess United States Treasury checks knowing them to have been stolen from the mail, in violation of 18 U.S.C. 371 (Count 1), and possession of those checks, in violation of 18 U.S.C. 1708 (Count 2). He was sentenced to two and one-half years' imprisonment on the conspiracy count, which term has now been completed. Imposition of the sentence on the substantive count was suspended, with petitioner being placed on probation for a period of five years.

1. The evidence at trial showed that petitioner tried to sell nine Treasury tax refund checks, which had been stolen from the mail, to Patrick Kelly, a government informant. During a meeting, in accordance with instructions by FBI agents, Kelly directed petitioner to an FBI agent, who was working undercover at a sham trucking company staffed by undercover agents. Petitioner met twice with the agent, each time for the purpose of arranging a sale of the stolen checks. During the course of the second, tape-recorded conversation, petitioner sold the checks to the agent for $1500, which he received in thirty pre-marked $50 bills. 625 F.2d 465, 466 (1980).

The defense consisted of petitioner's testimony that he had been entrapped because the government allegedly had been dissatisfied with his role as a government informant. He maintained that the government had framed him by having Kelly ask him to take the envelope containing the checks to the trucking company. Although petitioner admitted that some of the remarks made by him in the taped conversation related to criminal activities, he argued to the jury that he fabricated some of the remarks and that Kelly furnished the remainder, and that he made those statements only to allow him to "blend in" at the operation, which he suspected was illegal, so that he could report any information to the government. 625 F.2d at 466.

The government disclosed to the court during trial that petitioner's attorney, John Seffern, had been suspended from practice in state court in New York.[1] Petitioner informed the court that he had been aware of this fact prior to retaining Seffern, that he was "satisfied with [him]," and that Seffern was "conducting the case in accordance with [petitioner's] desires" (Tr. 616).

Following his conviction, petitioner argued on appeal that the government had presented false evidence at trial and had negligently suppressed other exculpatory evidence, and that he had been convicted on the basis of "other crimes" evidence and erroneous instructions to the jury. The court of appeals affirmed the conviction in an unpublished judgment

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[1] The suspension, for commingling of funds, was for two years, effective July 20, 1976. However, Seffern had not been reinstated by the time of the district court's ruling on petitioner's motion under 28 U.S.C. 2255 (Pet. App. A27).

order, 591 F.2d 1337 (1979) and this Court denied review, 441 U.S. 961 (1979).

2. a. Petitioner then filed a motion under 28 U.S.C. 2255 to vacate his conviction on the ground, inter alia, that the actions of Frank Paglianite, an attorney who was a government informant during the time of petitioner's trial, violated his Sixth Amendment right to the assistance of counsel. The district court denied the motion, but the court of appeals remanded for an evidentiary hearing regarding Paglianite's relationship to petitioner and the nature of any communications he made to the FBI. 625 F.2d at 470. Although the issue was not raised by petitioner, the court of appeals also expressed concern over the fact that defense counsel had been suspended from the practice of law in New York, and the court of appeals indicated that this issue might similarly be considered by the lower court. 625 F.2d at 470-471 n.4.

b. After a hearing regarding Paglianite's role and the extent of information supplied by him to the government, the district court held that there was no Sixth Amendment violation as a result of Paglianite's actions. Finding petitioner's testimony "very difficult to credit" (Pet. App. A21), the court concluded that there "was no attorney-client relationship between Costanzo and Paglianite in this proceeding" (*id.* at A24). The court explained that the relationship between petitioner and Paglianite was primarily a business partnership (*id.* at A21-A22), which included participation in "seemingly criminal enterprises" (*id.* at A21). The court also observed that any legal representation of petitioner by Paglianite was "intermittent" and "confined to some business transactions," and that it apparently had ceased by the time

of petitioner's trial in 1978, since petitioner did not produce any bills for legal services after 1976 (*id.* at A22).

The district court further found that Paglianite's status as an informant did not give rise to a Sixth Amendment violation, because the FBI agents were "careful to insure that any information they received from [Paglianite] did not involve matters which evolved from the Paglianite-Costanzo relationship"; had "warned Paglianite that they didn't want and would not accept this type of information"; and "frequently checked with their superiors to make sure they were avoiding any impropriety" (Pet. App. A24). The district court also considered four specific communications from Paglianite to the FBI that were noted in the FBI agents' files and found that none "had any impact on the trial," except for Paglianite's disclosure that petitioner's attorney, Seffern, had been suspended from practice in the state courts of New York (*id.* at A25-A26).

As to the latter disclosure, on the day after Paglianite told the FBI agent of Seffern's status, counsel for the government informed the trial court of the suspension. That was on the fourth day of trial. The court then inquired into Seffern's standing, and Seffern stated that he was in good standing in the state courts in Wisconsin and in the United States District Courts for the Southern and Eastern Districts of New York and the United States Court of Appeals for the Second Circuit.[2] On the basis of those memberships, the district court concluded that Seffern qualified for

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[2] Seffern's statement that he was in good standing in the Wisconsin courts was not true, because he had been suspended from the Wisconsin bar in 1974 for nonpayment of dues (Pet. App. A12 & n.1).

admission pro hac vice under its local Rule 4(c). Pet. App. A12-A13. In these proceedings under 28 U.S.C. 2255, the district court acknowledged that the trial judge, confronted with the need to make decision mid-trial, had allowed Seffern to continue his representation (Pet. App. A31). But after the "luxury of reflection" (*ibid.*), the court on collateral attack concluded that the trial judge should not have allowed Seffern to appear pro hac vice under the court's local Rule 4(c). In the court's view, the result of the trial judge's action was that petitioner had "no representation in fact," and a new trial was required (Pet. App. A32-A33).

c. The court of appeals affirmed in part and reversed in part, holding that petitioner is not entitled to relief under 28 U.S.C. 2255 (Pet. App. A1-A17). The court of appeals affirmed the district court's ruling that no Sixth Amendment violation occurred as a result of Paglianite's status as an informant (Pet. App. A4-A11). The court first concluded that the district court's finding that petitioner and Paglianite did not have an attorney-client relationship in connection with the criminal prosecution was not clearly erroneous, in light of the evidence that Paglianite had never entered an appearance in the case, that petitioner's dealings with Paglianite near the trial date were of a business nature (including an elaborate scheme to defraud Citibank), and that petitioner had not paid Paglianite for legal services for some time prior to trial (*id.* at A4-A5). The court of appeals also found that there was no intentional intrusion by the government into the defense camp by virtue of Paglianite's status as an informant, because Paglianite had informed the FBI agents that he no longer represented petitioner and would not do so

in the prosecution, and because the FBI agents had instructed Paglianite not to disclose any information pertaining to defense strategy and had consulted with their superiors to make sure that their use of Paglianite remained within legal limits (*id.* at A5-A6). Finally, the court of appeals reviewed each of the four communications made by Paglianite that, in petitioner's view, established a Sixth Amendment violation, and it concluded that none involved a disclosure of confidential information or prejudiced petitioner (*id.* at A6-A11). On this basis, the court held that the district court correctly refused to dismiss the indictment under the Sixth Amendment on the basis of Paglianite's disclosures (*id.* at A11).

The court of appeals reversed the district court's holding that its local Rule 4(c) barred the trial judge from permitting Seffern to proceed pro hac vice (Pet. App. A11-A16). The court of appeals held that the local rules committed the matter to the trial judge's discretion and did not absolutely bar the trial judge from allowing Seffern to appear pro hac vice merely because he had been temporarily suspended from practice in his home state (Pet. App. A14-A15). The court also found no defects in Seffern's actual performance that gave rise to a Sixth Amendment violation (*id.* at A16).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review of petitioner's fact-bound claims is not warranted.

1. The district court found that there was no attorney-client relationship between petitioner and Paglianite in connection with petitioner's prosecution (Pet. App. A21-A24), and the court of appeals af-

firmed that determination (*id.* at A4-A5). That finding by the district court is, at the very least, not clearly erroneous. To the contrary, it is supported by the evidence indicating that Paglianite never entered an appearance in the case, that petitioner had not paid Paglianite for legal services for some time prior to trial, and that petitioner's dealings with Paglianite near the trial date were primarily of a business nature, including a scheme to defraud Citibank (*id.* at A5). The district court specifically stated that it "could not credit" petitioner's contrary testimony (*id.* at A21), and the court of appeals did not disturb that credibility ruling (*id.* at A5). It does not appear that petitioner directly challenges this determination that no attorney-client relationship existed, and this concurrent finding by the courts below would not in any event warrant review by this Court. *Berenyi* v. *INS*, 385 U.S. 630 (1967).

2. Petitioner nevertheless contends (Pet. 21-29) that the Court should grant review to consider what petitioner maintains (Pet. 21) is a question of "first impression"—the use of an attorney as a government informant. Petitioner does not explain, however, how Paglianite's status as a member of the bar is relevant if, as both courts below found, petitioner had no attorney-client relationship with Paglianite with respect to the prosecution, but was merely acting as any other government informant in providing information regarding petitioner's activities. Indeed, petitioner refers to the lower court's determination whether there was an attorney-client relationship as a "critical fact-finding" (Pet. 30), and the existence of an attorney-client relationship obviously was significant to the Court in *Black* v. *United States*, 385 U.S. 26 (1966), and *O'Brien* v. *United States*, 386 U.S.

345 (1967), upon which petitioner erroneously relies (Pet. 26-27).[3]

3. Petitioner next contends (Pet. 29-33) that his conviction should be reversed because Paglianite disclosed confidential information pertaining to defense strategy, in violation of the Sixth Amendment. This contention was correctly rejected by the court of appeals after a thorough review of each of the four communications in issue (Pet. App. A5-A11), three of which petitioner again relies upon in this Court.

a. First, petitioner contends that Paglianite's disclosure that Seffern had been suspended from the practice of law in New York was "confidential information learned in the defense camp" (Pet. 32). This contention is without merit. Counsel's suspension in New York State was a matter of public record and had nothing to do with defense strategy. Moreover, if counsel for the government had not brought this matter to the trial court's attention, the government might have been subject to criticism for allow-

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[3] In *Black* and *O'Brien*, the government overheard, by means of electronic surveillance, actual conversations transpiring between counsel and the defendant during the course of the criminal case. See 385 U.S. at 27; 386 U.S. at 346 (Harlan, J., dissenting). Moreover, the Court in *Weatherford* v. *Bursey*, 429 U.S. 545 (1977), rejected the notion that the decisions in *Black* and *O'Brien* were meant to establish a per se rule requiring reversal of the conviction even when communications between the defendant and his attorney were overheard. 429 U.S. at 551-552. Rather, the court stated that "[i]f anything is to be inferred from these two cases with respect to the right to counsel, it is that when conversations with counsel have been overheard, the constitutionality of the conviction depends on whether the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial." 429 U.S. at 552. Under that standard, petitioner clearly is not entitled to prevail in this case.

ing the court's apparent misapprehension regarding Seffern's status to go uncorrected. Certainly, no Sixth Amendment violation occurred as a result of that incident.

b. Second, petitioner argues (Pet. 30-31) that the government learned in a December 2, 1977 communication from Paglianite of petitioner's plans to subpoena Charles Coveney, another FBI informant. The court of appeals correctly concluded, however, that the statement related by Paglianite to the FBI agent that petitioner's private detective was to "get" Coveney referred to a threat to harm Coveney, not to an effort to subpoena him to testify at trial, and that there was no prejudice to petitioner from this limited disclosure (Pet. App. A8-A9).[4] The obtaining of information about such threats does not violate the Sixth Amendment, because there is no Sixth Amendment right to counsel in connection with the planning or commission of such conduct. See, *e.g.*, *United States* v. *Darwin*, No. 82-5794 (11th Cir. Apr. 16, 1985), slip op. 3005.

c. Third, petitioner relies (Pet. 31-32) on a December 22, 1977 report by Paglianite to the FBI that petitioner had taped meetings with an FBI agent. Petitioner argued below that this communication revealed that petitioner had taped a particular meeting on April 5, 1976 at which, petitioner claimed, he was

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[4] Petitioner also points out (Pet. 30-31) that the FBI agent testified that he was first told by Coveney a month later that he had been subpoenaed. See Pet. App. A8-A9. That fact, however, does not suggest that the use of *Paglianite* as an informant was unlawful. To the contrary, this testimony confirms that the FBI agent did not understand Paglianite's report to refer to defense plans to subpoena Coveney. Pet. App. A9.

offered immunity from prosecution in exchange for providing information; petitioner maintained that he intended to use the tape at trial to impeach the FBI agent's testimony that he never offered petitioner immunity. See Pet. App. A9. The district court rejected petitioner's claim of a Sixth Amendment violation based on this disclosure, stating (Pet. App. A25 n.2):

> This was not pursued in any depth at trial. I infer that this would not be helpful to petitioner. Apparently, [petitioner] was cooperating with the FBI in another investigation.

The court of appeals likewise found no Sixth Amendment violation in this incident. It observed that there had been a number of meetings between petitioner and the FBI agent, and at least one of those meetings had been taped with the agent's knowledge. Moreover, the disclosure to the FBI that petitioner had taped conversations with the agent did not even refer to the April 5, 1976 meeting or to petitioner's intended use of the tape. Against this background, the court of appeals correctly concluded that the FBI had known for some time of the information imparted on December 22, 1977—that petitioner had recorded the FBI agent—and that the district court's finding that no confidential defense strategy was disclosed therefore was not clearly erroneous. Pet. App. A9-A10. Petitioner insists (Pet. 31-32) that even if the December 22 report did not specifically refer to the April 5 conversation or its possible use to impeach the FBI agent, the mere fact that the tapes were discussed disclosed defense strategy. The difficulty with this argument is that Paglianite's report to the FBI concerning petitioner's taping of conversations with an FBI agent did not state that this taping was

discussed in connection with the defense of the instant charges.

d. Finally, petitioner pointedly does not rely on the fourth set of communications by Paglianite to the FBI, in which Paglianite stated that petitioner was attempting to bribe him to file a false affidavit (Pet. App. A6-A7). As the court of appeals held (*id.* at A10), that information related to a prospective crime and is not protected by any Sixth Amendment privilege.

4. Petitioner next argues (Pet. 33-38) that the courts below should have found a Sixth Amendment violation because of what he characterizes as a "pervasive intrusion" by the government into the defense camp. This argument is untenable in light of the findings by both courts below. The district court found, and the court of appeals agreed, that there was no intentional intrusion and that FBI agents were careful to avoid receipt of any disclosures relating to defense information (Pet. App. A6, A24); and, as explained above, no confidential or useful information relating to defense strategy in fact was related by Paglianite to government agents. On this record, there plainly was no "pervasive intrusion" by the government into the defense camp.[5]

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[5] Petitioner argues (Pet. 28-29) that the agents' directions to Paglianite, warning him not to disclose information about the trial, were inadequate to safeguard "the confidences of counsel and trial strategy." However, petitioner fails to suggest how, if at all, they could have further protected against disclosure of confidential communications, except perhaps by prohibiting Paglianite from talking to petitioner or to them at all. Given the fact that Paglianite had informed the FBI of ongoing criminal schemes by petitioner unrelated to the prosecution, such as the fraud involving Citibank and the attempt to bribe Paglianite to submit a false affidavit, that course would

5. Finally, petitioner makes a catch-all argument (Pet. 38-41) that a Sixth Amendment violation occurred "[u]nder all the circumstances of this case" (Pet. 38). He renews only in passing the argument that he had no "representation in fact" because his attorney, Seffern, was suspended from practice in New York State. See *ibid.* The court of appeals correctly rejected that contention (Pet. App. A11-A16), and its ruling is consistent with the Ninth Circuit's rejection of a virtually identical claim in *United States* v. *Hoffman*, 733 F.2d 596 (1984), cert. denied, No. 84-5227 (Nov. 26, 1984). Disbarment or suspension of an attorney by a state court does not automatically bind a federal court to impose the same sanction. *Theard* v. *United States*, 354 U.S. 278, 282 (1957); *In re Ruffalo*, 390 U.S. 544, 547, modified on other grounds, 392 U.S. 919 (1968). See also *In re Gordon*, 640 F.2d 1143, 1146 (10th Cir. 1981). At the time of petitioner's trial, Seffern had not been suspended from practice before the United States District Courts for the Southern and Eastern Districts of New York or the United States Court of Appeals for the Second Circuit, and it therefore cannot be said that he was without the assistance of the "Counsel" to which the Sixth Amendment refers.

Petitioner also argues (Pet. 38-39) that Seffern's effectiveness was "questionable." However, petition-

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have prevented the agents from performing their investigative functions. Other information related to FBI agents by Paglianite, such as the fact that petitioner was trying to "get" a witness, were regarded by agents as relating to some attempt to harm the witness, and clearly could not have been ignored because of the possibility that the government would inadvertently obtain information about defense strategy despite the agents' efforts to avoid that consequence.

er's claim of ineffective assistance of counsel was correctly rejected by the court of appeals on petitioner's first appeal in these proceedings under 28 U.S.C. 2255 (625 F.2d at 470-471), and petitioner does not renew here any of the specific objections raised and rejected on that occasion. Nor does petitioner point to any other specific errors by counsel that were outside the range of reasonably effective assistance or show that there is a reasonable probability that, but for any such errors, the result of his trial would have been different. See *Strickland* v. *Washington*, No. 82-1554 (May 14, 1984). Petitioner therefore is not entitled to relief.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

SAMUEL ROSENTHAL
Attorney

MAY 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 10229